IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA:

RSA.No.29 of 1996.

Reserved on 10-9-2007

Date of Decision : 27-9-2007

Hari Kumar. …Appellant.

Versus:

Dwarka Dass and others. …Respondents.

Coram:
The Hon'ble Mr.Justice Sanjay Karol,Judge.

Whether approved for reporting?[1]

For the appellant: Mr.Bhupinder Gupta, Sr.Advocate with Ms.Charu Gupta, Advocate.

For Respondents.

Sanjay Karol, J .

The present appeal arises out of the judgment and decree dated 31st August, 1995 passed by the District Judge, Bilaspur in Civil Appeal No.84 of 1988 titled as Ram Lal and another Vs. Hari Kumar and others, reversing the judgment and decree dated 1st June, 1988 passed by the Sub Judge, Bilaspur in case No.196/1 of 1987.

For the purpose of convenience, the appellant is referred to as the plaintiff and the respondents are referred to as the defendants.

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

The appeal has been admitted on the following substantial questions of law:

> 1.Whether section 38 of the Specific relief Act prohibits the issuance of perpetual prohibitory or mandatory injunction, whether breach of the obligation to maintain the width of path on the part of the defendant-respondents was duly established on the record so as to entitle the plaintiff to claim the relief of injunction in the suit?.
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> 2. Whether the judgment and decree of the lower appellate court suffers from material infirmities of law and facts in ignoring the material evidence in the shape of Ext. P-4, report of the Local Commissioner and spot inspection report of the learned Presiding Officer
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> 3. Whether the learned lower appellate Court was justified in reversing the judgment and decree of the learned trial court merely on the ground that the relief of injunction is discretionary relief and would be withheld in case the decree is in-effectual and un-useful to the concerned party?
>
> 4.Whether the judgment and decree of the learned lower appellate court vitiated on account of misreading of pleadings and material evidence on the record?

The plaintiff filed a suit for prohibitory injunction praying that the defendants be ordered to put the path in its original position and dismantle the obstruction/construction raised on the same.

The trial Court after examining the material on record including the deposition of the witnesses returned its finding to the effect that the path in question was in possession of the Municipal Committee and under the ownership of the State Government and that the defendants had raised the wall on the

same without any right, title or authority during the pendency of the suit which is a cause of concern and inconvenience to the passer-by. Accordingly, a decree was passed directing the defendants to demolish the wall raised on the said path and restore the path in its original shape as noted in the revenue record comprised in Khasra No.59 situate in Up-Mohal Rura Sector, Bilaspur.

Aggrieved by the same, the legal heirs of the defendants preferred an appeal which was decided in terms of the impugned judgment and decree.

During the pendency of the suit, the revenue field officer was appointed as a Local Commissioner to demarcate the land and ascertain whether the retaining wall on the spot was in fact constructed on the public path or not. As per Ext.P-4, the report of said Kanungo, the wall raised by the defendants stands on Khasra No.59 which is recorded in the ownership of the State Government.

During the pendency of the appeal, the learned District Judge personally inspected the spot and found that the retaining wall had been constructed by the defendants. He has recorded that It could not be ascertained whether the path had been shortened or not, but, however the path certainly appears to be reduced and some difficulty may arise if the path were to be widened and metalled by the Committee in future.

The first Appellate Court came to the conclusion that since the dispute pertains to the construction of wall on government land, the plaintiff did not have any right to institute the suit as no legal right of the plaintiff was being threatened by the defendants.

The fact that the wall has been constructed by the defendants is not in dispute. The trial Court came to the conclusion that the wall was constructed on the government land which was in possession of the Municipal Committee and in the ownership of the State Government. The court below came to the conclusion on the basis of the report submitted by the revenue officer, who had visited the spot.

The path is used by public and belongs to the State Government. It has come on record that the plaintiff has a house in the neighbourhood at the place where the wall has been constructed. The main user of the said path is the plaintiff which is also borne out from the record. Therefore, It cannot be said that the plaintiff does not have any right in law to institute the proceedings in question. In any case, the locus of the plaintiff was not in issue to be determined; however, the first appellate Court has returned the finding on the same. In my view, any infringement of plaintiff’s right to use the path, recorded as such in the revenue record would give locus and cause of action to the plaintiff to institute the suit in question. The substantial questions of law are answered accordingly.

In view of the aforesaid discussions, the judgment and decree passed by the first Appellate Court is set aside and that of the trial Court is restored.

(Sanjay Karol),
Judge.

September 27 ,2007.(R)